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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BRIAN LEIGH TOBIAS, Defendant and Appellant.	B202403 (Los Angeles County Super. Ct. No. MA026922)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Chung, Judge. Affirmed.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Brian Leigh Tobias appeals the judgment entered following his conviction by jury of two counts of attempted murder of a peace officer in which Tobias personally discharged a firearm. (Pen. Code, §§ 664, subd. (e)/187, 12022.53, subd. (c).) The trial court sentenced Tobias to 40 years in state prison plus two life terms.[1]

We reject Tobias's claims of error and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

1. *The evidence adduced at trial.*

On July 3, 2003, at 4:30 p.m., Los Angeles County Deputy Sheriff Timothy Vanderleek was on patrol with Deputy Bryan Lovelace in a marked Ford Expedition SUV. Vanderleek, the driver of the SUV, saw a Honda Civic occupied by two individuals parked in a residential driveway on Robina Avenue in Palmdale. A male adult was leaning into the driver's window. Vanderleek formed the opinion the male was engaged in a drug transaction. Vanderleek parked and watched the Honda, which was driven by Tobias, then followed it from Robina Avenue.

The deputies stopped directly behind the Honda at the intersection of 12th Street East and East Palmdale Boulevard. Tobias looked in the rearview mirror and made eye contact with Vanderleek, then gave Vanderleek "the middle finger." At about the same time, Lovelace learned the Honda had been reported stolen. Vanderleek followed Tobias onto Palmdale Boulevard and activated the emergency lights and siren. As Tobias approached 15th Street, his speed increased dramatically. Tobias cut off an Astrovan as he made a left turn to go north on 15th Street. Tobias went through a posted stop sign at Avenue Q and, as Tobias approached Avenue P, he reached around the floorboard of the driver's seat of the Honda as if looking for something or concealing something.

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[1] The trial court imposed this term consecutively to a term of 28 years in state prison on various other charges that were affirmed by this court in B182233.

Tobias went through a stop sign and turned right on Avenue P. Shortly after he made the right turn, Tobias displayed a sawed-off .22 caliber rifle in his right hand. Tobias frantically was looking behind him at the deputy's SUV, which was approximately 17 feet behind the Honda at that point.

Vanderleek testified Tobias "turned around in his seat, pointed, straightened his arm out, pointed the weapon at us, and fired one round through the rear window." Tobias "took a few seconds in what I would say [was] aiming the weapon at us and then pulling the trigger." Tobias "[m]ade an effort to steady and pulled the trigger . . . ." Tobias aimed in the head and chest area of the deputies.

The shot shattered the Honda's rear windshield, which fell in one piece onto the roadway. Vanderleek began to swerve to avoid being a stationary target and increased the distance from the Honda to approximately 40 feet. When the deputies aimed their handguns out the windows of the SUV, Tobias grabbed the female passenger by the hair and pulled her towards the driver's side, preventing the deputies from firing at Tobias.

Tobias went through a posted stop sign at Avenue P and 30th Street East. As soon as Tobias passed 30th Street East, he again turned towards the deputies as he had before, aimed the rifle and fired another shot at the deputies. Vanderleek testified, "There was a lot of effort put into turning around to make sure he was facing us and getting a good line of sight with the rifle." From Vanderleek's perspective, the rifle was pointed right at them. At the time of the second shot, the deputies were no more than 40 feet from the Honda and the SUV was directly behind the Honda. Vanderleek saw muzzle flash when Tobias fired the second shot.

Tobias turned east onto Avenue N and swerved into an oncoming motorcycle, causing the motorcyclist to drive onto the shoulder of the road to avoid being struck. At the point where Avenue N becomes a dirt road, several of the other vehicles involved in the pursuit became disabled. Vanderleek was able to continue the chase in the SUV until the Honda became disabled at about 140th Street. Tobias exited the Honda and pulled the female passenger out the driver's door by her hair, then held her

in front of him, using her as a shield. Tobias alternately pointed the rifle at her head and at the six deputies involved in the chase. Tobias dragged the female to a large rock and held her for three or four minutes before he surrendered. The female was hysterical.

The sawed-off rifle contained no live rounds. However, two live rounds were found in the Honda. Vanderleek found no holes or gunshot damage to the SUV.

Mandy Warwick, the female passenger in the Honda with Tobias, testified Tobias lived with her the month preceding this incident. During the chase, Warwick thought the police were shooting at them. Warwick said that, possibly on Avenue Q, she heard a gun go off inside the Honda and glass from the back window landed all over her. Warwick did not hear a gunshot before the windshield broke and she did not hear any gunfire coming from the Honda. Warwick heard the gun go off "maybe only twice" during the chase. Warwick claimed she was scared and nervous during an interview with Detective Stephen Lankford and lied to him. Warwick testified Lankford stopped and started the tape recorder and tried to put words in her mouth. Warwick claimed she did not remember parts of the interview played for the jury during the trial.

2. *Argument.*

The prosecutor argued the evidence indicated Tobias turned around on a straight stretch of road, leaned back, pointed and fired two shots at Deputies Vanderleek and Lovelace. The prosecutor argued traditional attempted murder principles as to each of the charged counts of attempted murder and asserted Tobias did not haphazardly shoot the rifle.

As to count two, the attempted murder of Deputy Lovelace, the prosecutor also argued a "kill zone" theory. Reading from CALCRIM No. 600 as given in this case, the prosecutor stated, " 'In order to convict the defendant of the attempted murder of Deputy Br[y]an Lovelace [on a "kill zone" theory], the People must prove that the defendant not only intended to kill Deputy Timothy Vanderleek but also intended to kill Deputy Br[y]an Lovelace, or intended to kill anyone within the kill zone.' [¶]

Now, what does that mean? [¶] It means this: It means when there is a small group of people and you aim at somebody in that group of people and you don't care who you hit, you are liable for the attempted murder of everybody in there. Because you shouldn't be able to say, after you shot at one person: ['']Oh, I'm sorry, police officers. I didn't mean to kill him. I meant to kill that other person['']and get off with it. [¶] That's what the law says. If there is a kill zone, a particular area of harm, and in this case it is a cab of the [SUV], . . . maybe [three] feet in distance, two officers sitting right next to one another, their shoulders are probably about only a foot apart, that in itself is a kill zone. That's an area where harm can occur when somebody shoots into that particular area."

The prosecutor argued the evidence showed Tobias believed his life was more valuable than the life of the motorcyclist or the deputies and suggested that, had Tobias succeeded in injuring the motorcyclist, the deputies would have stopped to render assistance. Similarly, Tobias fired two shots into "a three foot space," the cab of the SUV, which qualified as a "kill zone, because it's that close, because it's an area where two people are sitting right next to one another. [¶] And he doesn't care which life he takes, as long as he takes one, because if he kills the driver, then the whole pursuit is off. [The driver] can't chase him anymore. But if he kills Lovelace, again, [the driver is] going to have to stop and take care of his partner. [¶] This defendant doesn't care who he kills. He just cares about killing somebody . . . ."

Defense counsel argued Tobias would have at least struck the SUV if he had been trying to kill the officers. Defense counsel concluded Tobias was trying to escape and he shot one time, breaking the windshield, in an attempt to scare the officers. Therefore, Tobias was not guilty of attempted murder.

3. *Deliberations.*

During deliberations the jury asked, "If you aim in the direction of the SUV. . . is the entire front of the [SUV] considered the kill zone?" In response to this question, the trial court cited the jury to CALCRIM Nos. 200 and 222.[2]

A second question stated: "Please, kill zone – a definition." In response, the trial court referred the jury to CALCRIM No. 600, the instruction the prosecutor quoted in argument, and added: "In addition, kill zone is defined by the nature and scope of the attack. [The a]ttack must reasonably allow the inference that defendant intended to kill some primary victim by killing everyone in that primary victim's vicinity."

4. *Verdicts and sentencing.*

The jury convicted Tobias of two counts of attempted murder with the personal discharge of a firearm but found the offenses were not willful, deliberate and premeditated and found the offenses were not committed for the benefit of a criminal street gang.

Tobias admitted two prior prison terms. The trial court sentenced Tobias to life plus 20 years in state prison on each count and ordered the term on count two to be served consecutively to the term on count one based on its finding the evidence showed Tobias fired two separate shots at the SUV.

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[2] The trial court's response stated, "That is a question for the jury to decide, not the court. [¶] CALCRIM [No.] 200, second paragraph: 'You must decide what the facts are. It is up to you, exclusively, to decide what happened, based only on the evidence that has been presented to you in this trial.' [¶] CALCRIM [No.] 222, first paragraph: 'You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.' "

CONTENTIONS

Tobias contends there was insufficient evidence to support the convictions of attempted murder, the instruction on the "kill zone" theory (CALCRIM No. 600) was incorrect, confusing and was inappropriate in this case, and the prosecutor committed misconduct.

DISCUSSION

1. *Sufficiency of the evidence.*

a. *Traditional attempted murder principles*.

Tobias argues there was insufficient evidence to show the specific intent to kill either Deputy Vanderleek or Deputy Lovelace under traditional attempted murder principles. He notes both deputies testified Tobias aimed at "them." However, a conviction of attempted murder requires a finding the defendant harbored express malice toward each victim. Tobias asserts no "single bullet" case has affirmed multiple convictions of attempted murder unless the victims simultaneously were in the same line of fire. (E.g., *People v. Smith* (2005) 37 Cal.4th 733 [baby in car seat directly behind mother]; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, [one policemen crouched behind another].) Here, unlike *Smith* or *Chinchilla*, Vanderleek and Lovelace were seated side-by-side and were never aligned so as to permit the possibility both might have been killed by the single bullet.

Smith and *Chinchilla* are distinguishable in that this is not a single bullet case. Tobias aimed at the deputies and fired two separate times. When a defendant does a direct but ineffectual act towards accomplishing a killing with the intent to kill a human being, the completed crime of attempted murder has been committed. As stated is *Smith*, " 'The act of firing toward a victim at close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . . " [Citation.]' " (*People v. Smith, supra,* 37 Cal.4th at p. 741.)

Tobias also argues the jury's finding the attempted murders were not willful, deliberate and premeditated necessarily negated the element of specific intent necessary to support a conviction of attempted murder. However, the finding the offenses were not willful, deliberate and premeditated does not demonstrate Tobias lacked the specific intent to kill. Whether an offense is willful, deliberate and premeditated turns on evidence related to the manner of the killing, planning and motive. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) Clearly, a defendant may harbor an intent to kill even where the offense is not willful, deliberate and premeditated.

In sum, there is sufficient evidence to support Tobias's conviction of two counts of attempted murder on traditional attempted murder principles.

b. *The "kill zone" theory*.[3]

Tobias contends the evidence was insufficient to support the conviction of attempted murder of Deputy Lovelace under the "kill zone" theory the People presented in this case.

The "kill zone" theory is based on the case of *People v. Bland* (2002) 28 Cal.4th 313. In *Bland*, the defendants fired into a car occupied by three individuals, killing the intended victim and wounding two passengers. *Bland* noted the doctrine of transferred intent did not apply to attempted murder but upheld convictions of two counts of attempted murder under the "kill zone" theory. (*Id.* at p. 330.) *Bland* described a "kill zone" as arising when a defendant escalates the mode of attack from a single bullet aimed at the victim's head to a hail of bullets or an explosive device.

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[3] In the opening brief, Tobias sought reversal of both counts of attempted murder on the ground there was insufficient evidence to support either conviction under traditional attempted murder principles or the "kill zone" theory. In the reply brief, Tobias concedes count one was not prosecuted on a "kill zone" theory. We therefore do not address the "kill zone" theories of error raised in Tobias's opening brief as to count one.

In those cases, the factfinder may infer an intent to kill the primary target and a concurrent intent to kill everyone in the "kill zone." (*Ibid.*.)

Bland noted previous published cases had affirmed convictions of attempted murder on a concurrent intent theory without referring to the "kill zone" concept. For example, in *People v. Vang* (2001) 87 Cal.App.4th 554, the defendants fired multiple gunshots into two different residences using high-powered, wall piercing ammunition. Although the defendants intended to kill one individual, *Vang* upheld conviction of 11 counts of attempted murder finding the jury reasonably could infer the defendants harbored the specific intent to kill every living being within the residences. Also in *People v. Gaither* (1959) 173 Cal.App.2d 662, 666-667, conviction of seven counts of administering poison with intent to kill were affirmed based on evidence that indicated the defendant mailed poisoned candy to his wife with the intent it would be distributed to everyone in the household.

Tobias argues every other "kill zone" case involves multiple gunshots. (E.g., *People v. Gutierrez* (1993) 14 Cal.App.4th 1425 [three counts of attempted murder affirmed where the defendant fired five shots at close range into a group of three individuals].) Tobias argues that, unlike *Bland*, *Vang* and *Gutierrez*, there was no "hail of bullets" aimed at a primary target which created a "kill zone" as demonstrated by the absence of bullet impacts to the deputies' SUV. Tobias asserts the method he chose was not designed to insure the death of everyone in the "kill zone," Tobias further argues that, unlike *Bland* or any of the hypothetical situations described in *Bland*, there was no evidence Tobias was aiming at anyone in particular and the deputies testified Tobias aimed the weapon "at us." Thus, there was no primary target in this case.

Whether two bullets constitute a hail of bullets need not be determined. On the facts presented, Tobias fired two bullets at deputies in a pursuing police vehicle traveling at a high rate of speed. This evidence was sufficient to show a concurrent intent to kill everyone in the SUV in order to end the pursuit.

As to the claim there was no primary target, the People argued at trial, and the jury reasonably could infer, the primary target was Vanderleek, the driver. Had Tobias shot the driver, the pursuit would have ended. Because the deputies were seated next to each other inside the police vehicle, the jury reasonably could infer Tobias, while intending primarily to kill Vanderleek, concurrently intended to kill Deputy Lovelace seated next to him. As the prosecutor argued at trial, injury to either deputy would have ended the pursuit. Thus, there was substantial evidence to support the conviction of attempted murder in count two on a "kill zone" theory.

2. *Any error in CALCRIM No. 600 was corrected by the trial court's response to the jury's question.*

Tobias contends the instruction on the "kill zone" theory (CALCRIM No. 600) was incorrect, confusing and misleading.

As relevant to this contention, CALCRIM No. 600 stated: "A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Deputy Br[y]an Lovelace, the People must prove that the defendant not only intended to kill Deputy Timothy Vanderleek but also either intended to kill Deputy Br[y]an Lovelace, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Deputy Br[y]an Lovelace or intended to kill Deputy Timothy Vanderleek by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Deputy Br[y]an Lovelace."

Tobias contends the first two sentences of the instruction incorrectly permitted the jury to find a concurrent intent to kill if Tobias placed *anyone's* life in danger by firing in the direction of the deputies. However, *Bland* held a "kill zone" arises only

where the means employed is meant to ensure the death of *everyone*, not just *anyone*, in the "kill zone." Tobias concludes CALCRIM No. 600 is inconsistent with the teaching of *Bland*.

An identical claim of instructional error was rejected in *People v. Campos* (2007) 156 Cal.App.4th 1228, 1241-1244. *Campos* found CALCRIM No. 600 misstated the "kill zone" theory by using the word "anyone" instead of "everyone," but found the error harmless. (*People v. Campos*, at pp. 1243-1244.) *Campos* found no possibility the jury misapplied the instruction so as to fail to find the defendant had the specific intent to kill. *Campos* noted the jury properly was instructed on the elements of attempted murder, including the requirement of the specific intent to murder the person whose attempted murder is charged, and on express malice. (*People v. Campos, supra,* at p. 1243.)

Tobias argues *Campos* cannot be extended to the present fact situation because *Campos* was a classic "kill zone" case in that the defendant fired a barrage of bullets at close range killing two occupants of a vehicle and wounding the third who was shot three times. Thus, *Campos* involved multiple bullet wounds to each victim and the mode of attack was designed to insure the death of the primary target by ensuring the death of everyone in the "kill zone." Under those facts, the difference in instructing the intent to kill "anyone" in the "kill zone" versus "everyone" was not necessarily inconsistent with *Bland*.

These distinctions do not persuade us the result should be different. Additionally, in response to the jury's second question, the trial court specifically stated the attack "must reasonably allow the inference that defendant intended to kill some primary victim by killing *everyone* in that primary victim's vicinity." (Italics added.) Thus, any ambiguity in CALCRIM No. 600 was corrected by the trial court's answer to the jury's question.

3. *This is not a single bullet case.*

Tobias contends instruction on the "kill zone" theory was inappropriate in this "single bullet" case. Tobias argues a single bullet cannot create a "kill zone" because a single bullet is not a method designed to create a zone that ensures the death of the primary target by ensuring the death of everyone in the "kill zone." Thus, the single shot fired by Tobias could have killed, at most, one of the deputies. According to Tobias, this was not a method designed to kill everyone in the "kill zone." (*People v. Bland, supra*, 28 Cal.4th at pp. 329-330.)

Although Tobias refers to the case as involving a single bullet, the evidence showed Tobias fired twice. Indeed, the trial court imposed a consecutive term on count two based on its finding Tobias fired two separate shots. Thus, we have no occasion to address the "single bullet" issue. (See *People v. Smith, supra*, 37 Cal.4th at p. 746, fn. 3.)[4] Similarly we need not address respondent's argument the "kill zone" theory can apply in a single bullet situation, where, as here, the potential victims are in a speeding vehicle. The respondent argues that, had a single bullet killed the driver, the passenger might have perished in a traffic collision caused by the driver's death.

4. *Prosecutorial misconduct.*

Tobias contends the prosecutor committed misconduct by misstating the burden of proof, misstating the law regarding "kill zone" and vouching.

a. *Governing Legal Principles*

" 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the *federal* Constitution when they infect the trial with such " 'unfairness as to make the resulting

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[4] The California Supreme Court has granted review in *People v. Stone* (2008) June 25, 2008, S162675, to address whether a jury should be instructed on the "kill zone" concept when a single shot is fired into a crowd and the defendant was not ostensibly shooting at anyone in particular and there was no "primary" target.

conviction a denial of due process.' " [Citations.] Under *state law,* a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citations.] [¶] 'A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 965-966; *People v. Thornton* (2007) 41 Cal.4th 391, 454.)

Where defense counsel fails to object, the defendant may argue on appeal that counsel's inaction deprived defendant of the constitutional right to the effective assistance of counsel. (*People v. Lopez, supra,* 42 Cal.4th at p. 966.) To succeed on a claim of ineffective assistance of counsel, the defendant must prove (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

b. *Application*.

(1) *Burden of proof*.

The prosecutor stated, "[P]eople tend to think that reasonable doubt is this insurmountable barrier that you can't ever reach. People get convicted of crimes every day based on reasonable doubt, and that's because a reasonable doubt is a fairly clear concept if you look at it." The prosecutor argued proof beyond a reasonable doubt meant "proof that leaves you believing that the charge is true."

Tobias contends the standard of proof stated by the prosecutor more resembles the definition of probable cause for a search than proof beyond a reasonable doubt. Further, the argument trivialized and misstated the reasonable doubt standard. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36.)

Assuming Tobias is correct, an objection and admonition by the trial court would have cured the error. However, Tobias did not object or request an admonition.

He therefore has forfeited the issue for appeal. (*People v. Lopez, supra*, 42 Cal.4th at pp. 965-966; *People v. Thornton, supra*, 41 Cal.4th at p. 454.)

Moreover, Tobias suffered no prejudice related to this misstatement in that the trial court correctly instructed the jury on reasonable doubt and we must presume the jury followed the instruction and that any error was thereby rendered harmless. (*People v. Nguyen, supra*, 40 Cal.App.4th at p. 37.) Because any misconduct was harmless, we need not address whether the failure to object constituted ineffective assistance of counsel in that any failure by counsel was likewise harmless. (*Ibid.*, fn. 2.)

(2) *Misstatement of the law related to the "kill zone" theory*.

Tobias contends the prosecutor's argument, that Tobias was guilty of attempted murder when he fires into a group of people and does not care who he hits, is directly contrary to *Bland's* holding that a defendant must intend to kill some primary victim before a jury may infer concurrent intent. According to Tobias, the prosecutor also misstated the law by arguing the "kill zone" consisted of the passenger cab of the deputies' SUV. Tobias asserts the prosecutor's argument mirrored argument found to be misconduct in *People v. Anzalone* (2006) 141 Cal.App.4th 380.

In *Anzalone* the defendant fired at one victim, then fired another bullet in a different direction at three other people. The prosecutor argued " '[a]nytime someone is within the zone of danger, whether it be one, two, three or twenty people, somebody indiscriminately shoots towards a crowd of people, everything in that zone of danger qualifies. . . .' " (*People v. Anzalone, supra,* 141 Cal.App.4th at p. 391.) *Anzalone* found the prosecutor's argument was incomplete and the trial court had given no instruction on the "kill zone" theory. (*Id.* at p. 392.) Thus, the jury's only understanding of the "kill zone" theory came from the prosecutor's argument. *Anzalone* reversed the three counts of the attempted murder because the "kill zone" theory was legally incorrect. *Anzalone* held, "contrary to the prosecutor's argument, an attempted murder is not committed as to all persons in a group simply because a gunshot is fired indiscriminately at them." (*Id.* at p. 392.)

Here, the prosecutor did not argue that merely shooting indiscriminately into a crowd of people rendered Tobias guilty of attempted murder of everyone present. Rather, the prosecutor focused on the fact that Tobias turned purposefully and took careful aim at the pursuing deputies before he fired each shot. The prosecutor further suggested Tobias intended to kill the deputies in order to escape from them, just as he had intended to harm the motorcyclist who was forced from the road when Tobias swerved into the motorcycle's path on Avenue N.

Also, *Anzalone* is distinguishable in that the trial court in that case did not instruct on the "kill zone" concept. Thus, the *Anzalone* jury had only the prosecutor's flawed statement of the "kill zone" theory before it. Here, the jury was instructed on the "kill zone" theory and any misstatement of that theory by the prosecutor was corrected by the trial court's response to the jury's second question. Moreover, the trial court also instructed the jury that if the attorneys' comments conflicted with the trial court's instructions, the jury must follow the instructions. We presume the jury understood and followed this instruction. (*People v. Jablonski* (2006) 37 Cal.4th 774, 806-807; *People v. Boyette* (2002) 29 Cal.4th 381, 436.)

In sum, Tobias fails to demonstrate misstatement of the "kill zone" theory by the prosecutor or that he was prejudiced by the asserted misstatement.

(3) *Vouching.*

Tobias contends the prosecutor improperly vouched for Vanderleek and Lovelace by arguing the deputies "swore to tell the truth, and they told you the truth. They have no motivation to lie to you. They were being honest. You saw them up there. They were being honest to you. They weren't making things up."

Tobias asserts this argument constituted improper vouching in that it implied the prosecutor had information that was not available to the jury that demonstrated the deputies had no motive to lie and they were not making things up. (*People v. Medina* (1995) 11 Cal.4th 694, 757; *People v. Adams* (1960) 182 Cal.App.2d 27, 34-36.)

Putting aside Tobias's failure to object to this claimed instance of misconduct, the claim fails because the prosecutor did not suggest the deputies were telling the truth based on the prosecutor's personal knowledge or belief based on matters outside the record. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336-338; *People v. Young* (2005) 34 Cal.4th 1149, 1198; *People v. Medina* (1995) 11 Cal.4th 694, 757.) Rather, the prosecutor asked the jury to make its own credibility assessment by stating, "You saw them up here." This is not improper vouching and nothing in the prosecutor's "remarks invited the jury to abdicate its responsibility to independently evaluate for itself whether [the deputies] should be believed." (*People v. Bonilla, supra,* at p. 338.)

Tobias further contends the prosecutor, in rebuttal argument, suggested defense counsel had argued the deputies were lying. In fact, defense counsel did not argue the deputies were lying but indicated they were mistaken in their observations and recollection. Tobias asserts the prosecutor's argument made it appear the defense was accusing the deputies of lying. This left the jury with the impression the defense was trying to deceive the jury, thereby impugning the integrity of defense counsel. (*People v. Hill* (1998) 17 Cal.4th 800, 832.)

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Hill, supra,* 17 Cal.4th at p. 832.) "If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established. [Citation.]" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.)

Again overlooking Tobias' failure to object to this asserted misconduct, the jury heard defense counsel's argument and was capable of determining for itself whether defense counsel accused the deputies of lying. The prosecutor's argument in this instance did not impugn defense counsel's integrity.

(4) *Cumulative error*.

Finally, Tobias claims the number of instances of prosecutorial misconduct deprived Tobias of a fair trial. (*People v. Hill, supra,* 17 Cal.4th at p. 847.) Tobias claims the case was close because neither deputy was hurt and neither bullet struck the SUV. The prosecutor's misstatement of the "kill zone" theory, combined with the misstatement of the burden of proof and the vouching for the witnesses, struck at the heart of the defense and undermined any opportunity for a fair trial.

The claim of cumulative error fails because "no serious errors occurred that, whether viewed individually or in combination, could possibly have affected the jury's verdict." (*People v. Valdez* (2004) 32 Cal.4th 73, 128; *People v. Martinez* (2003) 31 Cal.4th 673, 704.)

DISPOSITION

The judgment is affirmed.

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